1 & 2

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Date of Decision: 18.04.2011

% Arb. P. Nos. 202/2005 & 203/2005

TARUN KR. JAIN, SOLE PROPRIETOR ..... Petitioner
Through: Mr. A.K.Singla, Sr.Advocate with Mr.Vivek Kishore & Mr.Anurag Jain, Advocates.

versus

M.C.D. ..... Respondent
Through: Ms. Mini Pushkarna, Standing Counsel with Mr.Rajesh Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment? : **NO**
2. To be referred to Reporter or not? : **YES**
3. Whether the judgment should be reported in the Digest? : **YES**

VIPIN SANGHI, J. (Oral)

I.A. No. 6885/2010 in ARB.P.No.202/2005
I.A. No. 6887/2010 in ARB.P.No.203/2005

1. These are the two applications preferred by the petitioner under Sections 14 & 15 of the Arbitration and Conciliation Act to seek appointment of a substitute arbitrator in place of the originally appointed arbitrator Mr. M.L. Jain, Advocate.

2. The petitioner preferred the aforesaid two petitions under Section 11 of the Act. Both these petitions were allowed by the Court

vide order dated 8th December, 2005 and in both these cases Mr.M.L. Jain, Advocate was appointed as the sole arbitrator.

3. The present applications have been preferred by the petitioner on 13th May, 2010. In the applications, it is averred in para 16 that in the month of April, 2010, counsel for the petitioner enquired about the status of these cases. It is stated that the learned arbitrator refused to conduct the arbitration proceedings as he has been suffering from ill health.

4. Upon issuance of notice, the respondent has filed its reply. The respondent has raised an issue of limitation, by urging that the claims now sought to be raised are barred by time. It is stated in para 10 that if the petitioner is now permitted to file its statement of claim, the same would be barred by limitation.

5. Vide order dated 20th October, 2010, the Court had requested the learned arbitrator to file the proceedings undertaken by him in a sealed cover. They have been filed.

6. The proceedings were started before him on 20th January, 2006. It appears that for some time the proceedings were adjourned as the petitioner stated that he would move an application to get the fee of the arbitrator fixed by the Court. The order sheet shows that the fees of the arbitrator was fixed at Rs.60,000/- vide order dated 4th September, 2006 passed in I.A. No. 6037/2006 in Arb P.No.202/2005. However, it appears that no similar application was moved in Arb.P.no.203/2005.

7. The learned arbitrator in the proceedings held on 18th October,

2006 in the presence of the parties, withdrew from the office of the arbitrator by observing:

> *"I am down with fever for a few days and confined to bed. I regret, I will not be able to entertain or take up the cited matters. Parties/their learned Counsels may kindly note and take appropriate steps to arrange for their re-reference."*

8. However, he continued to conduct proceedings in yet another reference pending before him arising out of Arb. Petition No. 193/2005. The learned Arbitrator rendered the award in that case on 25.09.2007.

9. Learned Senior Counsel for the petitioner Mr. Singla submits that the proceedings before the arbitrator continued from January, 2006 and were adjourned from time to time as the fixation of fees by the Court was awaited. He submits that the learned arbitrator did not require the petitioner to file his statement of claim at any stage of the proceedings till the date that he passed the order on 18th October, 2006.

10. Though the objection of the respondent is that the claims would be barred by limitation as of now, that may not be an accurate statement. The arbitration proceedings stood commenced when the agreement was invoked. The Court while allowing the applications under Section 11 of the Act did not go into the aspect of limitation vis-à-vis the claims of the petitioner. In my view, that is not the issue. The issue of limitation is with regard to the filing of the present applications after the termination of the mandate by the arbitrator upon his withdrawing from arbitration. As the aspect of limitation can be examined by the court suo moto, I proceed to examine the

same.

11. Mr. Singla submits that even after the passing of the order dated 18th October, 2006, the mandate of the arbitration did not stand terminated, as it would be for this Court to make an order declaring that the mandate stands terminated.

12. I cannot agree with this submissions in the light of the plain reading of the Section 14(1)(b) of the Act. It provides that the mandate of the arbitrator shall terminate if he withdraws from his office. The order dated 18th October, 2006 is a clear withdrawal from his office by the learned arbitrator. It is only when a controversy remain between the parties, concerning any of the grounds referred to in clause (a) of sub-section (1) of Section 14 (which deals with the *de jure* and *de facto* inability to perform his functions by the arbitrator, or where the arbitrator is alleged to have failed to act without undue delay) that the parties can approach the court to decide whether or not the termination of mandate has taken place. The parties are not expected to approach the court to seek an order for termination of the mandate of the arbitrator, even in cases where arbitrator has withdrawn from his office. Section 14(2) has no application to a case falling under Section 14(1)(b).

13. The period within which a party must approach the competent court to seek the appointment of an arbitrator is three years in terms of entry No.137 of the schedule to the Limitation Act. The right to apply to the court to seek the appointment of substitute arbitrator accrued upon the passing of the order dated 8th October, 2006.

Therefore the petitioner should have approached the court for appointment of substitute arbitrator by 17th October, 2009.

14. Reliance placed by Mr. Singla on Section 15(2) of the Act is again misplaced. All that the said provision provides is that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. However, this does not mean that the process for appointment of substituted arbitrator can be delayed by a party indefinitely. The said process has to be initiated within the period of limitation prescribed by law.

15. The Supreme Court in ***J.C. Budhiraja vs. Chairman, Orissa Mining Corporation Ltd.,*** *(2008) 2 SCC 444,* has dealt with the aforesaid aspect. Para 25 of the said decision reads as follows:-

> *"25. The learned Counsel for the appellant submitted that the limitation would begun to run from the date on which a difference arose between the parties, and in this case the difference arose only when OMC refused to comply with the notice dated 4.6.1980 seeking reference to arbitration. We are afraid, the contention is without merit. The appellant is obviously confusing the limitation for a petition under Section 8(2) of the Arbitration Act, 1940 with the limitation for the claim itself. The limitation for a suit is calculated as on the date of filing of the suit. In the case of arbitration, limitation for the claim is to be calculated on the date on which the arbitration is deemed to have commenced."*

16. Reliance placed by Mr. Singla on the decision of this Court in ***Satender Kumar vs. Municipal Corporation of Delhi and Anr.,*** *MANU/DE/0385/2010,* is of no way applicable, as the said case deals with the aspect, whether or not, the claims were barred by limitation. That is not the issue arising before me.

17. In my view, the present applications are clearly barred by limitation, and the same are accordingly dismissed.

VIPIN SANGHI, J

APRIL 18, 2011
Bisht